UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JULIO STEWART, A 29 510 525,

Petitioner,

-against

EDWARD McELROY, District Director of Immigration and Naturalization Service,

Respondent.

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98 Civ. 2465 (JSR)

REPORT AND RECOMMENDATION

FRANK MAAS, United States Magistrate Judge.

Petitioner Julio Stewart ("Stewart"), an alien who apparently entered this country without inspection, brings this proceeding pro se, seeking a writ of habeas corpus, pursuant to 28 U.S.C. § 2241, to compel the Immigration and Naturalization Service ("INS") to release him from custody pending deportation.[1] Stewart maintains that his continued detention is unlawful because the INS failed to deport him within six months of a final deportation order, as required by former section 242(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(c)(1994). As discussed below, I recommend that the petition be denied on two grounds: first, there has been no showing that the INS abused its discretion in failing to release Stewart; second, insofar as he relies upon any adverse custody determinations that the INS made prior to this year, Stewart has not exhausted his administrative remedies.

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[1] This matter was originally referred to Magistrate Judge Grubin for a Report and Recommendation. Upon her departure from the bench it was reassigned to me.

I. Factual and Procedural Background

A. Stewart's Criminal History

Stewart has a lengthy criminal record, having been convicted a dozen times before the INS ordered his deportation. (A 1-13).[2] On May 13, 1983, he pleaded guilty to a charge of criminal possession of a loaded firearm, for which he ultimately was sentenced to a nine-month term of imprisonment.[3] (A 1). On December 1, 1983, he pleaded guilty to a charge of attempted sale of marijuana in the fourth degree, attempted theft of services, and bail jumping in the third degree, receiving a ten-day sentence. (A 2). On March 5, 1984, he pleaded guilty to sale of marijuana in the fifth degree and petit larceny, receiving a two-month sentence. (A 3). On November 14, 1984, he pleaded guilty to possession of marijuana in the fifth degree, receiving a sentence of time served. (A 4). On March 6, 1985, he pleaded guilty to a sale of marijuana in the fifth degree and was sentenced to a ten-day prison term. (Id.). On March 26, 1986, he pleaded guilty to a sale of marijuana in the fourth degree, for which he was sentenced to five days in prison. (Id.). On October 10, 1986, he pleaded guilty to an additional two

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[2] References to "A" are to pertinent documents from Stewart's INS administrative file and references to "B" are to the INS record of administrative deportation proceedings, both of which are annexed to the Declaration of Assistant United States Attorney Meredith E. Kotler, dated June 19, 1998. References to "NA" refer to the additional documents from the INS administrative file concerning Stewart annexed as Exhibit A to Ms. Kotler's December 22, 2000 letter to the Court ("Kotler Letter").

[3] The New York State Division of Criminal Justice Services arrest history for Stewart with respect to this conviction indicates that he was initially sentenced to a ninety-day prison term which was later increased, for reasons that are unexplained, to nine months. (Id.).

counts of sale of marijuana in the fourth degree, receiving a ten-day sentence. (A 5-6). On November 6, 1986, he pleaded guilty to criminal possession of a controlled substance in the seventh degree, receiving a five-day sentence. (A 6). On March 2, 1987, he pleaded guilty to criminal possession of stolen property in the fifth degree, and was sentenced to a four-month prison term. (Id.). On October 21 and November 2, 1987, he pleaded guilty to sales of marijuana in the fourth degree, receiving, respectively, a five and a fifteen-day sentence. (A 7). On January 7, 1988, he pleaded guilty to criminal possession of a controlled substance in the seventh degree and was sentenced to six months in prison. (Id.).

B. Deportation Proceedings

In March 1988, Stewart was served by the INS with an Order to Show Cause and Notice of Hearing which alleged that he was subject to deportation under former INA §§ 241(a)(2) and (a)(11), 8 U.S.C. §§ 1251(a)(2) and (a)(11)(1988)(current version codified as INA §§ 237(a)(1)(B) and (a)(2)(B)(1), 8 U.S.C. §§1251(a)(1)(B) and (a)(2)(B)(i)(1994)), in that he was an alien illegally in the United States who failed to establish the date, place and manner of his entry into the United States, and who was convicted on November 2, 1987, after entry, of criminal sale of marijuana in the fourth degree. (B 57-58).

Stewart was taken into INS custody on or about April 8, 1988, following his release from Rikers Island. (A 14-15). On June 9, 1988, Stewart was represented by Reverend Robert Vitaglioni, an accredited INS representative, at a deportation hearing.

(B 18-45). Following the hearing, an Immigration Judge ordered Stewart deported on both of the grounds set forth in the Notice of Hearing. (B 19-22, 42-44). It appears that Stewart appealed the order of deportation, (B 16), but later withdrew his appeal pursuant to an August 16, 1988 writing in which he stated that he wished "to wave [sic] my right to be deported to Honduras voluntairly [sic]." (B 5). Although this note is somewhat cryptic, Stewart apparently was asking for permission to be deported voluntarily to Honduras, rather than involuntarily to Panama. (See B 20-21). Two days later, on August 18, 1988, the Board of Immigration Appeals ("BIA") affirmed the Immigration Judge's order of deportation, observing that aliens who were found deportable under former INA § 241(a)(11) "are not eligible for the privilege of voluntary deportation in lieu of deportation, irrespective of the 'good moral character' issue." (B 2-3).

The INS's subsequent efforts to deport Stewart have been beset by a host of difficulties which are directly attributable to Stewart's failure to cooperate. For example, when he was interviewed by the INS on Rikers Island on March 4, 1988, Stewart stated that he was a citizen of Panama, but refused to answer any further questions. (B 54-55). At his deportation hearing, however, although he admitted that he was not a United States citizen, Stewart denied that he was Panamanian and refused to answer any further questions about his citizenship. (B 26). Later the same year, Stewart told the INS that he was born in La Ceba, Honduras, on July 19, 1963 and had a Honduran birth certificate, but he refused to produce the certificate, noting that he had been detained for a long time

and "would do another fifty years" if necessary because the INS could not detain him forever. (A 23).

At the conclusion of the deportation hearing, on the basis of Stewart's prior admissions while at Rikers Island, the Immigration Judge designated Panama as Stewart's country of deportation. (B 19-22). On August 18, 1988, following the withdrawal of Stewart's appeal, the Immigration Judge issued a revised order directing that Stewart be deported to Honduras, with Belize as an alternative. (B 4).

A few days before the Immigration Judge issued his revised order of deportation to Honduras, Stewart was presented to the Consulate General of Panama, which declined to issue travel documents to him after he stated that he was not a Panamanian national. (A 26). Stewart also was presented to the Honduran Consular Service, which refused to interview him because he had no legal documents from that country. (A 27).

Since 1988, the INS has made further inquiries of both Panama and Honduras, but neither country has accepted Stewart for deportation. (A 47). An unsuccessful attempt was also made to deport Stewart to Belize. (A 28-29).

On September 21, 1988, Stewart set a fire in the cell where he was being detained. (A 47). Four INS officers were hospitalized as a result of this incident, during which Stewart had to be forcibly removed from his cell. (Id.). In addition, only two days earlier, Stewart engaged in a fight which resulted in his placement in disciplinary segregation. (Id.).

C. Stewart's Release from Custody

Despite his lack of cooperation and poor disciplinary record, Stewart was released from INS custody pursuant to an Order of Supervision on January 25, 1989. (A 18-19). Not long thereafter, Stewart resumed his former involvement with drugs. Indeed, he was convicted of five additional narcotics offenses over the next four years. On May 13, 1989, Stewart pleaded guilty to criminal possession of a controlled substance in the seventh degree and was sentenced to ten days in jail. (A 8). On August 25, 1989, he pleaded guilty to criminal possession of a controlled substance with intent to sell, and was sentenced to a two to four-year term of imprisonment. (Id.). He was released on parole on June 28, 1991. (A 9).

On December 10, 1991, while on parole, Stewart pleaded guilty to criminal possession of a controlled substance in the seventh degree, receiving a sentence of four months in jail. (Id.). On June 5, 1992, he pleaded guilty to criminal possession of a controlled substance with intent to sell, receiving a five-month sentence. (Id.). On February 23, 1993, he pleaded guilty to attempted criminal sale of a controlled substance in the third degree, and was sentenced to three to six years in prison. (A 10).

D. Stewart's Return to INS Custody

On March 16, 1993, Stewart's parole in connection with the August 25, 1989 drug offense was revoked. (A 47). Stewart remained in a state jail until October 16, 1997, when he again was paroled. (A 20-21). During the period that he was in state custody, Stewart gave a further statement to the INS on March 19, 1993, in which he

stated that, as far as he knew, he had been born in Panama and taken to the United States by his adoptive mother as a young child. (A 30).

On or about October 16, 1997, Stewart was again taken into INS custody. Thereafter, INS officials resumed their efforts to deport Stewart. Stewart was presented to the consular offices of Panama and Honduras but both countries again refused to accept him because he lacked adequate documentation. (A 47; NA 12). Over time, the INS has also contacted the Department of State, other units of the Department of Justice, and Interpol as part of its unsuccessful effort to secure the travel documents needed to effect Stewart's deportation. (A 23, 37-44).

E. Stewart's Requests for Release

On or about April 7, 1998, Stewart submitted a request to the INS District Director for release under supervision pending deportation. (A 45). In his application, Stewart alleged that he had "a good character," did not pose any "risk to national security," and would "submit any document required . . . to effect [his] deportation." (A 45). Stewart also noted that he had "family ties in the United State[s] as well as [a] job history." (Id.).

The Assistant District Director of INS denied Stewart's application by letter dated June 17, 1998. (A 46-48). In that letter, the Assistant District Director noted Stewart's lengthy criminal record, the jailhouse incidents recited above, Stewart's failure to cooperate with efforts to effect his deportation, and his apparent failure to report as required when he previously was released from INS custody in January 1989. (Id.).

Applying the Transition Period Custody Rules ("TPCRs") of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, § 303(b)(3)(B)(ii), 110 Stat. 3009-546, 3009-587 (1996), the Assistant District Director informed Stewart that he could only qualify for release if he established by "clear and convincing evidence that (1) you will not pose a danger to the safety of other persons or property, (2) you are likely to appear for any scheduled proceedings, and (3) the designated country for your deportation will not accept you." (A 48). The Assistant District Director concluded that Stewart had failed to make the required showings. She noted that Stewart's extensive criminal record and past destructive behavior established that he would be a danger to others, and that his prior failure to report and conviction for bail jumping made it unlikely he would surrender for removal if released. (Id.). There is no indication in the record that Stewart appealed this determination.

F. Stewart's Petition and the Government's Response

Stewart's petition, dated March 4, 1998, does not challenge the June 9, 1988 deportation order. Rather, Stewart's claim is that he is entitled to be released under INS supervision because he has been detained for more than six months in violation of former INA § 242(c), 8 U.S.C. § 1252(c). (Pet. ¶ 9(a)). He argues that the INS has had "more than ten (10) unhampered and cooperative years [in] which to execute deportation" and that it is "intentionally and deliberately delaying deportation for the sole purpose of punishing petitioner by prolonging his detention." (Id. ¶ 9(b)).

On June 19, 1998, the Government served and filed its Return to Stewart's petition, along with a Memorandum of Law ("Resp't's Mem."). Following the reassignment of this case to me, the Government supplemented its papers late last year at my request. (See Kotler Letter).

Finally, by letter dated February 26, 2001, Stewart sought additional time to serve a reply to the Kotler Letter. On March 2, 2001, by memorandum endorsement, I directed Stewart to file any such papers by April 20, 2001. No further submission has been received.

G. Post-Petition Events

Since the filing of Stewart's petition, the INS has several times considered whether Stewart should be released from custody pending deportation. On June 17, 1999, Stewart was notified that his file had been reviewed in the ordinary course because his deportation order was more than ninety days old. (NA 1). The Acting District Director determined, however, that Stewart's case did "not meet the criteria for further review for release." (Id.).

On February 8, 2000, following a further personal interview of Stewart,[4] the INS issued a preliminary decision, later approved by higher echelons at the INS, which acknowledged that Stewart had "taken steps to improve [him]self." (NA 2-3).

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[4] During the interview, Stewart evidently denied starting any fire in his cell. (NA 7). He also characterized himself as a "small time" drug dealer who has been drug-free since 1992. (Id.). The interviewer concluded that Stewart was "clearly a recidivist criminal" who had a "selective" memory of his prior involvement with the criminal justice system. (Id. at 8).

Nevertheless, the INS concluded that his "history of violent behavior and drug abuse" did not outweigh the equities in his favor. (NA 2).

On September 22, 2000, following a further file review, the INS again determined not to release Stewart, citing four factors:

> You have seventeen convictions spanning a seventeen year period, including convictions for drugs, weapons possession, theft, and bail jumping.
>
> Upon release from Service Custody in 1989, you never reported to the New York district office as required[;] then you continued in your criminal endeavors until your arrest.
>
> During your detention with the State and Service you have been the subject of several incidents that involved injuries to yourself and others.
>
> Since your detention with the Service you have actively hindered your deportation.

(NA 10).

The INS has submitted a declaration from a knowledgeable representative of the INS Executive Office for Immigration Review which indicates, in substance, that Stewart did not appeal any of the custody determinations made by the INS in 1998, 1999, or 2000. (See Decl. of Wanda Sue Gearheart, dated Jan. 16, 2000, ¶¶ 5-7).

The September 22, 2000 custody review, which is the last one that has been furnished to the Court, states that a further review will occur within six months. (NA 10). Although the outcome of any such review is not part of the record before this Court, an earlier internal INS communication, dated March 30, 2000, states that "it is doubtful Mr.

STEWART will convince the Service in the near future that he will not pose a threat to society if released. However, if he does, he is still considered an extreme flight risk." (NA 12). There consequently is no reason to believe that the INS has altered its position concerning Stewart's eligibility for release.

F. The New Regulations

Following the September 2000 review of Stewart's detention status, the INS promulgated regulations, effective December 21, 2000, regarding the pre-deportation release of criminal aliens such as Stewart. 65 F.R. 80281. These regulations are modeled after procedures that the INS previously employed to ensure periodic parole reviews for the "Mariel boat lift" Cubans[5] who remain in administrative confinement. Id. at 80282.

The new regulations require an initial review of a criminal alien's detention within the ninety-day period now allotted for removal of an alien. 8 C.F.R. §§ 241.4(c)(1) and (h)(1). (See Section II-A, infra). The INS District Director may retain jurisdiction for up to three months after the expiration of this removal period to conduct additional reviews. 8 C.F.R. § 241.4(k)(1)(ii). Thereafter, any further custody

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[5] As the Eleventh Circuit explained in Fernandez-Roque v. Smith, 734 F.2d 576, 578 (11th Cir. 1984):

> Approximately 125,000 Cubans arrived in the United States during the spring and summer of 1980 as part of the Mariel "Freedom Flotilla." Most of them lacked visas or documents entitling them to legally enter the United States. Many admitted to convictions for criminal offenses in Cuba . . . . After exclusion hearings, the government determined that the majority of the Cubans should be denied entry into the United States . . . . So far, the Cuban government has refused to take them back.

determinations regarding an alien who has not been released or removed within three months after expiration of the ninety-day removal period are made by the INS Executive Associate Commissioner, acting through a newly-created unit called the "Headquarters Post-Order Detention Unit" ("HQPDU"). Id. §§ (c)(2) and (k)(2). The HQPDU is required to conduct its own review; if this does not result in his release, the alien must then be personally interviewed by a review panel which makes its own recommendation to the Executive Associate Commissioner. Id. §§ (i)(3)-(6).

If an alien is not released, the HQPDU must conduct annual reviews of the alien's custody status. Id. § (k)(2)(iii). The alien can also request interim reviews not more than once every three months based upon changed circumstances. Id.

To be released at any stage of the new review process, an alien must satisfy the District Director or the Executive Associate Commissioner, acting through HQPDU, that the alien's release "will not pose a danger to the community or to the safety of other persons or to property or a significant risk of flight pending such alien's removal from the United States." Id. § (d)(1). Additionally, in order to recommend release, the review panel or the director of the HQPDU must conclude that:

> (1) Travel documents for the alien are not available or, in the opinion of the Service, immediate removal, while proper, is otherwise not practicable or not in the public interest;
>
> (2) The detainee is presently a non-violent person;
>
> (3) The detainee is likely to remain nonviolent if released;

> (4) The detainee is not likely to pose a threat to the community following release;
>
> (5) The detainee is not likely to violate the conditions of release; and
>
> (6) The detainee does not pose a significant flight risk if released.

Id. §§ (e)(1)-(6).

Finally, under the new regulations, there is no appeal to the BIA from the decision of the District Director or Executive Associate Commissioner. Id. § (d); 65 F.R. 80281. Accordingly, assuming that Stewart has now been reviewed pursuant to the new process, and that the HQPDU has rejected his request for release, there is no administrative appeal that must be exhausted before Stewart may seek judicial review.

II. Discussion

A. Potentially Applicable Law

Over the nearly thirteen-year period since Stewart first was ordered deported, the INS has made custody determinations in accordance with three separate statutory protocols. The first, which was in effect prior to the enactment of IIRIRA, afforded the Attorney General six months from the later of the date a deportation order became final or the alien arrived in INS custody to effect deportation, during which time the alien could be detained or released at the Attorney General's discretion. INA § 242(c), 8 U.S.C. § 1252(c) (1994); cf. Rodriguez v. United States, 994 F.2d 110, 111 (2d Cir. 1993)(per curiam)(INS should initiate deportation proceedings while alien is

serving criminal sentence even though deportation cannot occur until alien's imprisonment on such charges has terminated). When deportation within six months was not practicable, the former INA § 242(c) generally allowed aliens to seek to be released from custody. Aggravated felons such as Stewart, who were not lawfully admitted to the United States, were, however, barred from being released. As INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A), unambiguously stated, the "Attorney General shall not release such [a] felon from custody."[6] See Chen v. Slattery, No. 92 Civ. 1857, 1992 WL 167380, at *1-*2 (S.D.N.Y. July 6, 1992)(Patterson, J.)(distinguishing aggravated felons lawfully admitted to the United States, who could be conditionally released under former INA § 242(A)(2)(B), 8 U.S.C. § 1252(a)(2)(B), upon a showing that they posed no threat to the community and were likely to appear for scheduled hearings).

Pursuant to IIRIRA, former INA § 242 has been superseded by INA § 241, 8 U.S.C. § 1231(Supp. IV 1998). Section 241(a)(1)(A) now requires the INS to attempt to remove an alien within ninety days after a deportation or removal order becomes final or the alien is released from non-INS confinement. During this removal period, the alien must be detained. Id. § (a)(2). After the initial ninety-day period, however, an alien may

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[6] At that time, the definition of an "aggravated felony" pursuant to 8 U.S.C. § 1101(a)(43)(1988), included "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." "Controlled substance," in turn, was defined in Title 21 of the United States Code as "a drug . . . included in schedule I, II, III, IV, or V of part B of this subchapter. 21 U.S.C. § 802(6)(1988). Because marijuana is listed as a Schedule I drug under 21 U.S.C. § 812(c)(c)(10), Stewart was an aggravated felon within the meaning of INA § 242(a)(2)(A) as a consequence of his conviction for trafficking in marijuana, a Schedule I drug.

be released under supervision pending deportation pursuant to the recently-promulgated HQPDU regulations. Id. § (a)(3). The INS nevertheless may continue to detain aliens convicted of aggravated felonies or who have been determined to pose a risk to the community or to be unlikely to comply with the order of removal. Id. § 241(a)(6).

Finally, because IIRIRA greatly expanded the number of crimes constituting aggravated felonies that could lead to deportation or removal, Congress was concerned that the INS might lack sufficient capacity to house every alien subject to mandatory detention in the short term. For that reason, Congress created the TPCRs, a set of interim rules which were applicable to cases pending on October 9, 1996. See Ahmed v. McElroy, No. 97 Civ. 1121, 1997 WL 414119, at *2 (S.D.N.Y. July 24, 1997) (Koeltl, J.). The TPCRs authorized the INS to release aliens such as Stewart, who had been convicted of aggravated felonies, provided that they could satisfy the Attorney General that the country designated for removal would not accept them and that they "will not pose a danger to the safety of other persons . . . and [are] likely to appear for any scheduled proceeding." Pub. L. No. 104-208, 110 Stat. 3009-587, § 303(b)(3)(B)(i) (1996). The TPCRs expired on October 9, 1998. See Giwah V. McElroy, No. 98 Civ. 6028, 1999 WL 104593, at *2 n.7 (E.D.N.Y. Feb. 23, 1999)(Gleeson, J.).

B. Which Protocol Applies?

In her June 17, 1998 denial of Stewart's request to be released under supervision pending deportation, the INS Assistant District Director noted that Stewart's eligibility for release was governed by the TPCRs. (A 48). Similarly, in its initial

response to Stewart's habeas petition, the Government took issue with Stewart's attempt to apply former INA § 242(c) to his application for release, stating that his case was actually controlled by the TPCRs because they "apply to custody determinations in which petitioners claim a violation of former section 242(c)." (Resp't's Mem. at 12). The Government further noted that INA § 241 was inapplicable to aliens, such as Stewart, who were "in" deportation proceedings prior to April 1, 1997. (Id. at 11 n.5).

In its most recent submission, the Government has retreated from its former analysis. The Government now contends that Stewart's deportation proceedings concluded in 1988 when he was ordered deported. (Kotler Letter at 3 n.3). In that regard, Section 309(c)(1) of IIRIRA, 110 Stat. at 3009-635, barred the application of most IIRIRA amendments to the INA, including INA § 241, to an alien "who [was] in exclusion or deportation proceedings" prior to April 1, 1997. See Gutierrez v. Reno, 99 Civ. 11036, 2000 WL 1643585, at *5 (S.D.N.Y. Nov. 1, 2000)(Sweet, J.). According to the Government, because Stewart was no longer "in" deportation proceedings when Section 241 became effective, "the provisions of IIRIRA Title III-A (including those that created new INA section 241) do apply to Stewart." (Id.)(emphasis in original).

As the Fifth Circuit observed in Zadvydas v. Underdown, 185 F.3d 279, 286-87 (5th Cir. 1999), "While [IIRIRA Section 309(c)(1)] is not a model of clarity in respect to its retroactive application to an alien in [Stewart's] position, we find the INS' construction is reasonable." (Footnote omitted). Accordingly, because the deportation in this case was final nearly a decade before INA § 241became effective, the Government is

correct that Stewart was not "in" deportation proceedings on April 1, 1997. Consequently, his eligibility for release under supervision pending deportation is properly analyzed under INA § 241.

C. Stewart's Entitlement to Release

Under INA § 241(a)(6), 8 U.S.C. § 1231(a)(6), the INS is authorized to continue to detain an alien following the expiration of the ninety-day removal period if he has been convicted of a narcotics offense (other than a single offense involving 30 grams or less of marijuana) and poses a risk to the community or is unlikely to comply with the order of removal. Here, notwithstanding the claim of good character set forth in his April 7, 1998 application for release, Stewart can fairly be characterized as a one-man crime wave. He has been convicted at least seventeen times, with five of those convictions occurring during a period in which the INS previously had released him under supervision. Moreover, most of his convictions involve narcotics. To make matters worse, Stewart has at least one conviction for bail jumping, and he also failed to report as required during the period of his prior release under supervision. Given this history, there is an ample factual basis for the INS's determination that Stewart was unsuitable for release pending deportation. Indeed, any other conclusion is virtually inconceivable.

Significantly, Stewart would be in no better position if his application for pre-deportation release from custody were to be analyzed under either former INA § 242 or the now-expired TPCRs. Under INA § 242(a)(2)(A), 8 U.S.C. § 1252(a)(2)(A), the INS, as the Attorney General's designee, lacked the authority to release an aggravated

felon who was not lawfully admitted to this country. Accordingly, if the pre-IIRIRA statute were to be applied, Stewart would have no right to be released under supervision pending deportation. Id.; but see Kellman v. District Dir., United States Immig. & Natur. Serv., 750 F. Supp. 625 (S.D.N.Y. 1990)(Sweet, J.)(collecting cases addressing whether former INA § 242(a)(2) violates the substantive and procedural due process rights of a permanent resident alien convicted of an aggravated felony, concluding that it does, and directing that a writ issue unless a bail hearing occurs within thirty days).

Finally, although the TPCRs are no longer in effect, the INS did argue at an earlier stage of this proceeding that they were applicable to Stewart. It is therefore appropriate to consider the effect, if any, that the TPCRs would have had on Stewart's application for release. The TPCRs, however, are similar to INA § 241 in that an alien seeking to secure his release during the period that they were applicable would have been required to demonstrate to the satisfaction of the Attorney General that he posed neither a threat to the community nor a risk of failure to appear. IIRIRA § 303(b)(3), 110 Stat. 3009-587 (1996). Therefore, for the reasons noted above, it clearly would have been reasonable for the INS, as the Attorney General's designee, to conclude under the TPCRs that Stewart had not made the required showing.

D. Constitutionality of Stewart's Continued Detention

In addition to arguing that the INS abused its discretion by denying him pre-deportation release, Stewart's petition suggests that his detention for an extended period is violative of his right to substantive due process under the Fifth Amendment.

"'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697 (1987)(citations omitted). In Ahmed v. McElroy, 2000 WL 364975, a case arising under facts remarkably similar to those presented here, a habeas petitioner sought an order compelling the BIA to grant him supervised release pending appeal on substantive due process grounds. As here, the petitioner was an illegal alien (1) with multiple narcotics convictions, (2) who was released under an order of supervision, and (3) had committed a further violation of the narcotics laws during the period of his release. Moreover, the INS was unable to deport the petitioner because both of the countries that he had designated for deportation declined to issue travel documents for him.

Judge Koeltl rejected the petitioner's constitutional claim, noting that the INS had made repeated efforts to secure travel documents, which the petitioner had frustrated "by changing his story about his citizenship." Id. at *3. In light of these circumstances, Judge Koeltl held that the petitioner's detention for a period of nearly four years was "not unreasonable" and, in fact, "shorter than the amount of time that has been approved in similar cases." Id. (citing Doherty v. Thornburgh, 943 F.2d 204, 211-12 (2d Cir. 1991)(eight-year detention is constitutional where INS has acted in good faith and petitioner from the outset "has possessed, in effect, the key that unlocks his prison cell") and Dor v. District Director, Immig. & Nat. Serv., 891 F.2d 997, 1002 (2d Cir. 1989)

(five-year detention approved despite due process claim; "When the actions of the alien prevent the INS from effecting deportation, delaying tactics do not support the alien's claim for release from deportation.").

In this case, it is undisputed that Stewart has an extensive criminal history -- both before and after the initiation of deportation proceedings -- and that he failed to report to the INS when he previously was released under supervision. These facts clearly establish that the INS did not abuse its discretion by declining to release Stewart a second time pending deportation. Moreover, contrary to Stewart's conjecture, there has been no showing that the INS is acting punitively. Indeed, the record establishes that the INS is continuing its efforts to deport Stewart, notwithstanding his own lack of cooperation. While the amount of time that Stewart has been administratively detained is admittedly lengthy, it also is plainly a consequence of his changing -- and inconsistent -- renditions of the facts relevant to his citizenship. In these circumstances, the mere fact that he has been in continuous INS custody since September 1997 -- approximately three and one-half years -- does not mean that the INS has deprived him of his constitutional rights. See, e.g., Doherty, 943 F.2d at 211 ("Were Doherty's lengthy detention largely the result of a government strategy intended to delay, we might find a due process violation."); Ahmed, 2000 WL 364975, at *3 (no due process violation where "[t]he INS has made repeated efforts to obtain travel documents for the petitioner").

In sum, Stewart is unable to show that the INS abused its discretion under any of the three statutory protocols that conceivably could have been applicable to his

requests for release pending deportation. Additionally, because Stewart's continued detention is plainly the result of his own inconsistent statements concerning his nationality, and because the INS has aggressively sought to deport him, there is no basis for the claim that his substantive due process rights have been violated.

E. Exhaustion of Remedies

The INS regulations creating the HQPDU have eliminated the requirement that an alien bring an administrative appeal before seeking judicial review of an adverse INS custody determination. See, e.g., 8 C.F.R. § 241.4(d); 65 F.R. 80281 ("This rule eliminates the appellate role of the [BIA] in post-final order custody determinations"). Nevertheless, at the time that the INS conducted its June 17, 1998, June 17, 1999, and February 8 and September 22, 2000 reviews of Stewart's custody status, BIA review was available. (See, e.g., NA 1 (June 17, 1999 letter from the Assistant District Director to Stewart, stating that "You may appeal the District Director's decision to the [BIA]."). As the Government correctly observes, (Kotler Letter at 8), Stewart's failure to exhaust his administrative remedies with respect to those reviews of his custody status constitutes an additional ground for the denial of his habeas petition. See, e.g., Lleo-Fernandez v. Immigation and Nat. Serv., 989 F. Supp. 518, 519 (S.D.N.Y. 1998)(Martin, J.); Aboulkhair v. Immigation and Nat. Serv., No. 97 Civ. 1872, 1998 WL 2557, at *2 (S.D.N.Y. Jan. 5, 1998)(Mukasey, J.); Salazar v. Reich, 940 F. Supp. 96, 98 (S.D.N.Y. 1996)(Kaplan, J.).

It also bears mention that the new INS regulations concerning custody reviews contain a series of transitional provisions. See 8 C.F.R. § 241.4(k)(4). Insofar as relevant, these provisions state that an alien whose last review was a records review will be the subject of a further review by the HQPDU within six months. Id. Since the INS' September 22, 2000 review was based on its files, Stewart's next custody review should have occurred in or around March 2001. In the absence of any indication that anything other than the duration of Stewart's detention has changed since his last review, the Court can safely assume that the HQPDU determined once again that Stewart should not be released from custody under supervision. Moreover, because the BIA no longer reviews HQPDU custody determinations, Stewart is not required to pursue any further administrative remedies before he seeks judicial review of any adverse HQPDU decision.

The present petition was, of course, filed before the December 21, 2000 effective date of the new regulations. Nevertheless, even if Stewart's petition were amended to incorporate allegations that he recently has been denied release under supervision by the HQPDU, is clear that he would have no greater entitlement to release under the new regulatory scheme than he did under the previously applicable protocols.

There consequently is no basis for this Court to award Stewart a writ of habeas corpus.

III. Conclusion

Stewart's petition for a writ of habeas corpus compelling the INS to release him under supervision pending deportation should be denied.

IV. Notice of Procedure for Filing of Objections to this Report and Recommendation

The parties are hereby directed that if they have any objections to this Report and Recommendation, they must, within ten days from today, make them in writing, file them with the Clerk of the Court, and send copies to the chambers of the Honorable Jed S. Rakoff, United States District Judge, United States Courthouse, 500 Pearl Street, New York, New York 10007, to the chambers of the undersigned, at the United States Courthouse, 500 Pearl Street, New York, NY 10007, and to any opposing parties. See U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b). Any requests for an extension of time for filing objections must be directed to Judge Rakoff. The failure to file timely objections will result in a waiver of those objections for purposes of appeal. See Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72(b).

Dated: New York, New York
April 30, 2001

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FRANK MAAS
United States Magistrate Judge

Copies to:

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United States District Judge

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